No. 15-56434

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JENNY LISETTE FLORES, et al.
Plaintiff-Appellee,

v.

LORETTA E. LYNCH, Attorney General of the United States, et al.
Defendant-Appellant.

ON APPEAL FROM A FINAL JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA
D.C. No. 2:85-cv-04544-DMG-AGR

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

The *Flores* Settlement Agreement ("Agreement") resolved a lawsuit challenging "the detention and release of unaccompanied minors . . . ." Agreement at 3 (RE046). The Agreement "was intended to protect the rights and well-being of unaccompanied juveniles in INS custody."[1] And, it "established a nationwide policy for the detention, treatment, and release of [unaccompanied alien children ("UACs")] and recognized the particular vulnerability of UACs while detained without a parent or legal guardian present."[2] Neither accompanied minors nor their accompanying adult parents were the subject of the litigation or included within the scope of the Agreement.

The district court erroneously concluded that the Agreement governs not only the detention and release of *unaccompanied* minors, but also the detention and release of *accompanied* minors *and their adult parents*. Nothing in the Agreement, the intent of the parties, or the post-Agreement conduct supports finding that the Government knowingly agreed to resolve a lawsuit concerning unaccompanied minors by binding itself to a nationwide policy that severely restricts the

[1] HALFWAY HOME: Unaccompanied Children in Immigration Custody, Women's Refugee Commission and Orrick Herrington & Sutcliffe LLP, at 84 n.13, *available at*: http://www.refworld.org/pdfid/498c41bf2.pdf (last visited March 2, 2016), District Court ECF No. 185.

[2] Congressional Research Service, *Unaccompanied Alien Children: An Overview*, at 3 (Sept. 8, 2014), *available at*: http://trac.syr.edu/immigration/library/P8978.pdf (last visited March 2, 2016).

Government's detention and release authority over accompanied minors and their adult parents. The district court erred by dramatically expanding the scope of the Agreement far beyond the parameters of the underlying lawsuit (i.e., unaccompanied minors) without the requisite showing that the parties—expressly or implicitly—agreed to do so.

Moreover, Appellees suggest reading the district court's expansive interpretation of the Agreement to preclude the Government from exercising its statutory authority to use expedited removal and reinstatement of removal (with their associated detention authority) on apprehended families..[3] They seek to compel the Government to release apprehended families even where doing so would prevent necessary screening, evaluation of claims of fear, and reasonable measures to effectuate prompt removal when legally authorized. Under Appellees' theory, the practical outcome of affirming the district court would be the creation of a judicially-enforceable right to release for families apprehended at the border—even those who lack a credible fear of return—while their expedited removal proceedings are pending.

The Government did not, does not, and will not engage in a blanket "no release" detention policy for accompanied minors and their parents. The

[3] *See* Brief for Appellees, Dkt. No. 12 ("Pls. Br.") at 27-32; *see also* Brief of Immigrant Rights Organizations, Dkt No. 21-2, at 4.

Department of Homeland Security ("DHS") seeks only to limit the Agreement to its intended scope and to preserve the full range of statutory apprehension, detention and summary removal authority, all consistent with the safe, secure, and appropriate treatment of arriving families. Such detention is for the limited period necessary for essential processing and evaluation of humanitarian claims based on fear of return, as well as effectuating the removal of those who are determined to lack a legal basis for protection. . This authority is essential to respond to the current and future surges of persons (including families) seeking to enter without lawful status.

Second, even if the Agreement is interpreted to include accompanied minors, the Agreement cannot reasonably be read to govern the release of a parent with whom an accompanied minor is detained. Such a mandate for releasing adults—whether express or implicit—cannot be squared with the Agreement's terms or with the detention and removal authority Congress vested with DHS. Although the district court recognized that "the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention,"[4] the court nonetheless imposed a uniquely heightened standard for maintaining adult parents in immigration custody. This newly created standard impedes the statutory

[4] Order Re: Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' Motion to Amend Settlement Agreement ("Merits Order), July 24, 2015, at 8 (RE004).

authority governing the detention of adult aliens, *see* 8 U.S.C. §§ 1225, 1226, 1231, and restricts the Government's ability to maintain immigration custody over adult aliens apprehended with a child.

Finally, even if the Court interprets the Agreement as imposing the limitations that Appellees infer from the district court's ruling, this Court must equitably modify the Agreement to limit its scope to the unaccompanied minors covered by the original lawsuit. Alternatively, the Court should conclude that the Agreement's termination provision has been triggered by post-Agreement statutory enactments, including notably the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 ("TVPRA"), which codified or otherwise superseded the material terms of the Agreement and established a new statutorily mandated nationwide policy governing the treatment of unaccompanied minors.[5] Such amendment would preserve the safeguards that the Government agreed to (and that Congress has subsequently adopted) and ensure that appropriate judicial oversight remains available.

The Government does not challenge its obligations under the Agreement (as codified or superseded by the TVPRA) with regard to unaccompanied minors and has sought faithfully to comply with these obligations. *See* Pls. Br. at 50; 8 U.S.C.

[5] At a minimum, remand is necessary to conform the Agreement to subsequent statutory enactments and intervening legal authority.. *See* Brief for Appellants ("Gov't Br."), Dkt. No. 10-3, at 12-18.

§ 1232. And it recognizes its duties to provide humanitarian screening for credible or reasonable fear of return, to enforce the expedited removal and reinstatement of removal laws, and to provide safe and humane conditions of detention. The only question in this appeal is whether the Agreement should be expanded far beyond the scope of the original lawsuit in a manner that is inconsistent with the practices of the past two decades.

ARGUMENT

I. Appellees Incorrectly Raise Issues That Are Not on Appeal.

Appellees mistakenly focus on four issues that are not before the Court: (1) the conditions at U.S. Customs and Border Protection ("CBP") facilities; (2) constitutional challenges; (3) the conditions at U.S. Immigration and Customs Enforcement ("ICE") family residential centers; and (4) the existence of a purported "no-release policy" for alien families.

First, conditions at CBP facilities (*see* Pls. Br. at 4-5, 8, 28 n.17, 47-48, 50) are not at issue. The district court ordered the Government to "monitor compliance with their acknowledged standards and procedures for detaining class members in facilities that are safe and sanitary, consistent with concern for the particular vulnerability of minors, and consistent with Paragraph 12 of the Agreement . . . ." Order Re: Response to Order to Show Cause ("Remedies Order"), Aug. 21, 2015, at 14-15 (RE039-40). The Government is complying with that order and has not

raised this issue on appeal, *see* Brief for Appellants at 25 n.18, nor have Appellees cross-appealed. Therefore Appellees' focus on CBP facilities is misplaced and not properly before the Court. *See, e.g.*, *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1042 (9th Cir. 1992) (If "an appellee seeks to modify a judgment, he or she must file a cross appeal.").

Second, this appeal does not present any constitutional claims. The current litigation is solely on a motion to enforce compliance with the Agreement. Thus, the question before the district court, and now on appeal to this Court, is whether the Agreement extends to accompanied minors and, indirectly, whether the Government's detention of accompanied minors together with their parents in family residential centers violates the Agreement. Constitutional challenges to the existence of, or conditions in, family residential centers are not properly part of this appeal. Thus, any such allegations—which fall outside the scope of this litigation and which the Government disputes—are neither relevant here, nor appropriate for this Court to consider.[6]

Third, allegations regarding the "harmful" effects of family detention are both erroneous and outside the scope of this appeal. Pls. Br. 46-48; *see also* Brief of United Nations High Commissioner for Refugees, Dkt. No. 18-2; Brief of Social

[6] This same reasoning applies to non-contractual arguments offered by Appellees' amici.

Scientists, Dkt. No. 22-3. Plaintiffs never raised any challenge below that the conditions at family residential centers do not comply with the Agreement, and the district court did not make any findings on that issue. The conditions at those facilities are not germane to this appeal—which relates only to the question of how to correctly interpret the Agreement. Moreover, the Government provided substantial record evidence establishing that the conditions at family residential centers provide a safe environment that fulfills the needs of the residents. *See* Declarations of Stephen M. Antkowiak, District Court ECF No. 121-2, RE 100-136; Declaration of Thomas Homan ("Homan Decl.") ¶¶ 20, 29 (RE166-67, RE170-171). The Court should not rely on extra-record assertions mischaracterizing the conditions at these facilities in resolving the straightforward issues raised in this appeal.[7]

[7] Had the conditions at family residential centers been relevant to the proceedings, the Government would have provided evidence and expert testimony demonstrating both the safety of these facilities and the services provided to residents. The facilities provide, *inter alia*, medical and social services, child vaccinations, educational opportunities, and a centralized location for immigration representation by *pro bono* counsel. Indeed, the Court should not place any weight on briefs that purport to argue that family residential centers are adversely affecting the physical or mental safety and health of their residents. *See*, *e.g.*, Brief for the American Academy of Child and Adolescent Psychiatry and the National Association of Social Workers, Dkt. No. 18-2. There has been no opportunity for the Government to provide any evidence, let alone expert testimony, refuting such allegations, including whether any allegations of physical or mental harm are attributable not to the family residential centers but to the trauma that residents experience before or during their dangerous journeys to the United States.

Fourth, Appellees repeatedly refer to a purported "no-release policy" that is not, and has never been, the Government's policy. DHS did indeed have a different policy, pursuant to the Attorney General's binding precedent in *Matter of D-J-*, 23 I. & N. Dec. 572 (2003), of considering general deterrence of illegal immigration as one factor in an individualized custody determination. However, while litigating a separate case, DHS abandoned reliance on general deterrence with regard to the case-by-case custody determinations for families. *See R.I.L.R., et al. v. Johnson, at al.*, 80 F. Supp. 3d 164 (D.D.C. 2015).[8] Notably, that court found that the "No Release Policy" did not exist.[9] Following issuance of a preliminary injunction in *R.I.L.R.*, and a change in policy by DHS, general deterrence is no longer considered as a factor in individual custody decisions.[10]

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[8] The operative issue decided by the court in *R.I.L.R.* was whether DHS could permissibly detain families pursuant to *Matter of D-J-*, 23 I. & N. Dec. 572 (2003), which held that general deterrence of mass migration could be considered in making individual custody determinations under 8 U.S.C. § 1226(a). *See* 80 F. Supp. 3d at 176. The *R.I.L.R.* court ruled that Plaintiffs had a significant likelihood of succeeding on their claim that DHS's consideration of general deterrence as a factor in individual custody decisions was unlawful. 80 F. Supp. 3d at 190.

[9] *Id.* at 174 (acknowledging that DHS was conducting individualized custody determinations for aliens who were members of family units detained under 8 U.S.C. § 1226(a)).

[10] The net effect of the *R.I.L.R.* court's February 2015 order, in conjunction with a DHS policy announcement on May 13, 2015, is that DHS no longer detains anyone at a family residential center based in whole or in part on an individualized custody determination that considers general deterrence of illegal immigration. More

II. The Plain Text Establishes that the Agreement is Limited to Unaccompanied Minors

A. The Agreement Does Not Express an Intent to Expand its Scope Beyond the Scope of the Case Made by the Pleadings

Both the Supreme Court and this Court have held that a consent decree "*must come within the general scope of the case made by the pleadings . . . .*" *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004) (emphasis added); *see also Jeff D. v. Kempthorne*, 365 F.3d 844, 852 (9th Cir. 2004).[11] According to the plain text of the Agreement, the scope of the case made by the pleadings was a challenge to "the constitutionality of Defendants' policies, practices and regulations regarding the detention and release of *unaccompanied minors* taken into the custody of the Immigration and Naturalization Service (INS) in the Western Region." Agreement at 3 (RE046) (emphasis added); *see also Reno v. Flores*, 507 U.S. 292, 294 (1993)

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importantly, reversing the district court's erroneous decisions would not lead to the "resumption" of any alleged "no-release policy." After DHS announced that it would "discontinue invoking general deterrence as a factor in custody determinations in all cases involving families," the *R.I.L.R.* court directed the parties to meet and confer regarding whether the preliminary injunction was still necessary. The parties agreed to dissolve the *R.I.L.R.* preliminary injunction and administratively close the case, subject to an agreed-upon procedure that allows for reopening the case if the Government reinstates consideration of general deterrence as a factor in individual custody determinations. *See R.I.L.R. v. Johnson,* Order, June 29, 2015, ECF No. 43.

[11] Appellees fail to discuss these important cases and do not even attempt to address the critical underlying principle espoused therein.

(stating that this litigation concerned "alien juveniles who are not accompanied by their parents or other related adults"). Because this case was solely about *unaccompanied* minors,[12] interpreting the Agreement to apply to accompanied minors *and* their adult parents would necessarily require this Court to find language within the Agreement that expresses the Government's intent to cover factual and legal matters outside the scope of the pleadings of the original lawsuit.

No such language exists. Nothing in the Agreement can properly be construed to express an intent to expand its scope to include issues – such as detention and release of accompanied minors and their parents – that were not raised or litigated in the underlying lawsuit. The district court erred in holding that this intent could be unambiguously gleaned from the sentence in the Agreement that defined the *Flores* class as "all minors who are detained in the legal custody of the INS." Merits Order at 4 (RE008) (citing Agreement ¶10 (RE050)).

[12] Appellees state, without citation, that "the original Complaint was *not* limited to unaccompanied minors as Defendants now claim." Pls. Br. at 18. Appellees fail to provide any textual evidence from the Complaint itself to support this conclusory statement, and their argument is contradicted by the plain text of the Agreement's first recital and the Supreme Court's decision in this case. In addition, the Complaint alleges that the legacy INS acted unlawfully by refusing to release juvenile aliens to other adults in situations where a parent or legal guardian failed personally to appear to take custody of the minor. *See* Complaint, July 11, 1985, District Court ECF No. 1, *available at*: http://www.clearinghouse.net/chDocs/public/IM-CA-0002-0001.pdf (last viewed March 3, 3015). An alien child "for whom no parent or legal guardian in the United States is available to provide care and physical custody," is, by definition, an unaccompanied alien child. 6 U.S.C. § 279(g)(2).

As previously explained, before using the term "all minors" in Paragraph 10, the parties used the same "all minors" terminology to describe the class certified by the Court in 1986. *See* Gov't Br. at 37-38. That 1986 certification order was limited to minors "who have been, are, or will be denied release from INS custody *because a parent or legal guardian failed to personally appear to take custody of them*." *See* Order, Aug. 8, 1986, at 2 (RE042) (emphasis added). The certification order—which tracked Paragraphs 1 through 8 of the Complaint as explained below—did not encompass the broad universe of "all minors apprehended by the INS in the Western Region of the United States," but only those who were apprehended unaccompanied. Thus, it follows that the class definition contained in the Agreement, when it referenced "[a]ll minors[,]"covered this same group of individuals originally certified as a class by the district court: namely, those who are under 18 and are in custody because a parent or legal guardian failed to appear.

Appellees' argument that the Government "only rel[ies] on a portion of the 1986 class certification order" misses the point. Appellees Br. at 18. The remainder of the 1986 class certification order does not expand the scope of the certified class. The district court's 1986 certification order created two interrelated classes that comprehensively addressed unaccompanied minors in detention. The first class concerned Plaintiffs' legal claim that unaccompanied minors should be released to persons other than their parents or legal guardians. *See* Order, Aug. 8,

1986, at 2 (RE042).[13] The second class recognized that some unaccompanied minors would remain in detention due to the lack of a suitable sponsor, or for other reasons, and was designed to address the conditions at facilities housing these minors. *Id.* at pp. 2-3 (RE042-43).[14]

The Complaint demonstrates that the second class refers to those unaccompanied minors not released as members of the first class, as it presented the allegations in precisely that manner. *See* Complaint ¶¶ 1-8. Paragraphs 1 through 6 of the Complaint allege that the Government was violating the law by detaining unaccompanied minors during the removal process unless a parent or legal guardian could appear to take custody. Paragraphs 6 through 8 then allege that, instead of releasing these minors to "other adult relatives or friends . . . defendants incarcerate *such minors* in facilities where there [sic] welfare is wholly neglected." Complaint ¶ 6 (emphasis added). This scope of the class and the Agreement as a whole is further demonstrated by the first recital, which describes

[13] The first class was: "All persons under the age of eighteen (18) years who have been, are, or will be arrested and detained pursuant to 8 U.S.C. § 1252 [(1982)] by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who have been, are, or will be denied release from INS custody because a parent or legal guardian fails to personally appear to take custody of them."

[14] The second class was: "All persons under the age of eighteen (18) years who have been, are , or will be arrested and detained pursuant to 8 U.S.C. § 1252 [(1982)] by the Immigration and Naturalization Service ("INS") within the INS' Western Region and who have been, are, or will be subjected to any of the following conditions . . . ."

the case as involving a challenge to "Defendants' policies, practices and regulations regarding the detention and release of unaccompanied minors . . . ." Agreement at 3 (RE046).[15]

The district court failed to even discuss the Government's interpretation of the Agreement,[16] and therefore erred in concluding that "Defendants have offered no reasonable alternative reading that would make it ambiguous." Merits Order at 4 (RE004). To the contrary, there is no basis for including accompanied minors and their parents absent any definitive statement in the Agreement expressing the parties' intent to expand it beyond the class of unaccompanied minors in the underlying litigation.[17]

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[15] Appellees' assertion that "[t]he 1986 class was *not* limited to 'unaccompanied minors'" is further undermined by the illogic of their follow-on statement that "the 1986 class definition was superseded by the precise class definition included in the 1997 Settlement, and Defendants understood this for seventeen years." Appellees Br. at 19. If both the 1986 class definition and the 1997 class definition covered accompanied minors, there would have been no need to argue that the 1997 class definition superseded the 1986 definition.

[16] The district court's failure to discuss the 1986 class certification order is noteworthy after the court expressed interest in examining that order, *see* Transcript, April 24, 2015, District Court ECF No. 147 at 7:15-18, and instructed the Government to lodge the order. *Id.* at 42:1-3.

[17] The district court appeared to believe the Agreement should be interpreted to apply to accompanied minors unless the parties specifically expressed an intent to limit its scope solely to unaccompanied minors. Transcript at 9:8-10. But *Frew* and *Jeff D.* instruct that the opposite is true. The Agreement must be interpreted to apply solely to the original scope of the litigation unless the parties expressly and

Moreover, none of the other provisions Appellees rely upon provide "further support for the finding that the Agreement encompasses all minors who are in custody." *See* Pls. Br. at 15-17. Paragraph 9's statement that "[t]his Agreement sets out nationwide policy for the detention, release, and treatment of minors in the custody of the INS" simply restates the question the parties seek to resolve (*i.e.*, did the Agreement incorporate by reference the 1986 class definition of "all minors," which was limited to unaccompanied minors).[18]

Paragraph 12A's statement that "[f]acilities will provide . . . contact with family members who were arrested with the minor" supports the Government's position. The self-evident purpose of this clause is to provide minors with the ability to have contact with their apprehended family members during the period of their initial custody following their apprehension (today, such custody would most likely be with CBP). To the extent that Appellees believe that Paragraph 12A has any relevance to the legality of these minors' subsequent placement in family residential centers, then it must also be acknowledged that the statement in

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explicitly indicate their joint intent to expand the scope of the decree to apply more expansively (which did not occur here).

[18] Paragraph 9 weakens Appellees' argument to the extent that they seek to defend the district court's decision expanding this Agreement to require the release of accompanying parents. Merits Order at 9 (RE009). Titled "SCOPE OF SETTLEMENT, EFFECTIVE DATE, AND PUBLICATION," the paragraph plainly establishes that the "scope" of the Agreement contained no intent to provide any rights to adults.

Paragraph 12A that "an unaccompanied minor will not be detained *with an unrelated adult* for more than 24 hours" (emphasis added) indicates that it is permissible to detain a minor with a *related* adult (i.e. parent) without violating the Agreement.

Finally, the Agreement's exclusion of emancipated minors and minors convicted as adults from the definition of a "minor" does not mean that the parties specifically intended to include minors accompanied by their parents as part of this Agreement. These "excepted minors" listed in Paragraph 4 are exceptional, due to their emancipation or their incarceration for commission of a serious crime. These particular persons under 18 have been determined by a Court to be treated, at least for certain purposes, as adults. The parties' discussion of these particular minors says nothing about whether the parties specifically contemplated the question of what to do with *accompanied* minors in reaching this Agreement.

In sum, nothing in the Agreement expresses an unambiguous intent to expand the Agreement's scope beyond the class of unaccompanied minors who were the subject of the litigation that the Agreement resolved.

B. The Overall Context of the Agreement Clearly Establishes that the Agreement was Intended to Apply Solely to Unaccompanied Minors

The entirety of the Agreement and its exhibits further demonstrate that the parties did not intend to expand the Agreement's scope to include issues not

addressed in the lawsuit, such as the detention and release of accompanied minors and their adult parents.

First, the Agreement does not contain critical details that an agreement regulating the detention of parents with their children would include. For instance, the Agreement contains no provisions addressing the scope of parental rights for adult aliens apprehended with their children. Thus, it does not contemplate what should happen in cases where minors and parents wish to be detained together rather than being separated because of the proposed transfer or release of either the parent or the child alone. The Agreement also does not contemplate what should happen in cases where a minor wishes to be released from detention but the parent wishes for the minor to remain with the detained parent. And, the Agreement contains no provisions addressing the legal standard the Government should employ in deciding whether to keep the accompanying parents of apprehended alien minors in immigration custody. As discussed below, the district court struggled with this question, further indicating it was not contemplated by the parties.

Second, the Agreement and its exhibits contain over forty pages of detailed instructions enumerating how the Government must treat *unaccompanied* minors in its legal custody. This includes extremely specific requirements such as: (1) providing "minors with appropriate reading materials in languages other than

English for use during the minor's leisure time;" (2) providing "at least one hour per day of large muscle activity and one hour per day of structured leisure time activities;" (3) providing "[a]t least one (1) individual counseling session per week" and "[g]roup counseling sessions at least twice a week" and (4) providing "access to religious services of the minor's choice." Agreement, Exhibit 1 (RE067-71). Very little about an unaccompanied minor's day is left unaddressed.

In stark contrast, the Agreement provides no guidance regarding the treatment of minors apprehended with their parents. For instance, the vast majority of unaccompanied minors are ages 14 and older,[19] while accompanied minors will range from 1 month old to 17 years old without any specific age being most representative of the group.[20] Although the Agreement mandates items that are relevant to teenage minors, such as "family planning services" (RE068), it says nothing about matters required for the care of young children, such as diapers, cribs, strollers, formula, toys, and myriad other considerations that would be

[19] *See infra* FN 2 at p.1.

[20] *See* Mark Potter, *Border Agents Give Migrant Moms Diapers, Baby Formula* (June 18, 2014), *available at* http://www.nbcnews.com/news/latino/border-agents-give-migrant-moms-diapers-baby-formula-n134361 (last viewed March 2, 2016).

addressed if younger minors apprehended with their parents were intended to be included.[21]

Third, the influx provision" in Paragraph 12B would be illogical if the Agreement as a whole applied to *accompanied* minors. The provision is triggered only by the number of *unaccompanied* minors apprehended by the Government, not by the total number of minors. Thus, a surge of family units—which by definition does *not* include unaccompanied minors—would not trigger the influx provision of the Agreement. Yet, any logical reading of the influx provision makes clear that the greater flexibility it provides is triggered by the same category of minors who are the subject of the Agreement's substantive obligations. Under the district court's reading, even a surge involving millions of family units with *accompanied* minors would not trigger the influx exception so long as there were fewer than 130 *unaccompanied* minors in Government custody at a given time. This illogical result is at odds with the structure and concept of the entire Agreement, and it further underscores that the parties did not intend the Agreement to govern the custody of accompanied minors in family units.

[21] This disparity cannot be explained by disinterest in the needs of small children. Nor can it be explained by a belief that all apprehended families would simply be released together, as there would certainly be instances where a parent would be detained and separated from their small children (*e.g.*, when a parent is apprehended with narcotics or is abusing his/her child).

Finally, if the Agreement had contemplated covering minors who were accompanied by parents who maintained full parental rights over their children, it would have been legally improper for the parties' "Stipulation Re: Notice and Approval of Compromise of Class Action" (RE094), to fail to provide notice of this settlement (or an opportunity to object) to the parents of the accompanied minors who would now be covered by the Agreement. *See, e.g.*, *Voss v. Rolland*, 592 F.3d 242, 252 (1st Cir. 2010) (upholding class settlement involving disabled children because parents had "adequate notice of the proposed settlement"); *Daniel B. v O'Bannon*, 633 F. Supp. 919, 926 (E.D. Pa. 1986) (approving class settlement because "parents play a substantial role in the placement decision-making process" and finding that notice of the settlement was proper after "ordering notice of the proposed settlement sent by first class mail to all class members as well as to parents, guardians or family representatives"). The fact that the "notice of compromise of class action" was only addressed to the minors and not to their parents—and only provided an opportunity for minors (and not their parents) to object—is further confirmation that the parties only contemplated that the Agreement would apply to unaccompanied minors and not to minors whose parents were present and retained full parental rights over their children. Had the Agreement intended to cover accompanied minors, settlement of the case would have had to solicit the views of these minors' parents. Yet, nothing in the

Agreement or class notice indicates that parents were notified or consulted about the Agreement.

III. The Parties' Post-Agreement Conduct Proves that the Agreement Does Not Encompass Accompanied Minors or their Parents

Even if this Court finds the Agreement's intended scope to be ambiguous, the parties' past seventeen years of conduct confirms the Government's interpretation of the Agreement. Appellees state, without any factual support, that "*for seventeen years Defendants themselves interpreted the Settlement as including accompanied children and acted accordingly*." Pls. Br. at 23. This statement is demonstrably incorrect.

Had the Government believed that the Agreement precluded the use of family residential centers to detain families during removal proceedings, it would not have opened and continually operated the Berks County Family Residential Center ("Berks") since 2001. The Government provided evidence below that Berks has housed thousands of families who were placed in expedited removal proceedings and were detained for an average of 66 days. Homan Decl. ¶ 16 (RE165). Appellees do not dispute that, until this enforcement action was filed in 2015, they had never challenged any aspect of the Berks facility as violating the Agreement (even though they filed a motion to enforce thirteen other purported violations of the Agreement in 2004, including *de minimis* technical violations). Instead, Appellees attempt to minimize their inaction by claiming that the

Government has not sufficiently shown that Berks previously operated in a manner that violated the Agreement. *See* Pls. Br at 23-24. But Appellees have filed a motion seeking to close down Berks along with DHS's two other family residential facilities, *see* Motion, Feb. 2, 2015, District Court ECF No. 100, at 2, without explaining why the very same operation of Berks that did not previously violate the Agreement now constitutes a violation.

Second, had the Government believed that the Agreement precluded the use of family residential centers, it would not have opened and operated the T. Don. Hutto Residential Center ("Hutto") from 2006 to 2009 (which included the detention of families pursuant to an unopposed settlement from September 2007 to September 2009). The Government vigorously and successfully opposed a lawsuit seeking to close down this facility, which is the opposite of "interpreting the Settlement as including accompanied children." Pls. Br. at 23; *see Bunikyte, ex rel. Bunikiene v. Chertoff*, 2007 WL 1074070, at *2-3 (W.D. Tex. Apr. 9, 2007). The Hutto litigation settled in September 2007, and the Hutto facility subsequently housed families in removal proceedings for two years without any complaint from Appellees or any effort to object to the settlement as violating the Agreement.

Appellees do not explain their own inaction in permitting Hutto to operate for years without objection and instead argue that the Government should have appealed the district court's preliminary injunction decision. *See* Pls. Br. at 24-25.

This argument is without merit, as the settlement fully achieved the Government's goal of continuing family detention under improved facility conditions. The Government prevailed on the preliminary injunction motion in Hutto with regard to the legal viability of family detention and the inapplicability of the Agreement to adults, and thus there was no reason to appeal. Appellees do not explain why they did not contest the Hutto settlement during the two years after it was entered, despite the fact that such inaction supports the conclusion that they did not view the continuation of family detention at Hutto as violating the Agreement.[22]

Third, for many years the Government has been providing only the names and information pertaining to *unaccompanied* minors in the semi-annual reports it has provided to Plaintiffs' counsel under Paragraph 28 of the Agreement—even though it has openly housed accompanied minors at Berks since 2001 and at Hutto

[22] Neither of two other arguments offered by Appellees support their view of the Government's course of conduct. First, Appellees claim that one immigration judge's decision interpreting the Agreement binds the Government. *See* Pls. Br. at 23. This is incorrect. Only precedential decisions of the Board of Immigration Appeals are binding on DHS. 8 C.F.R. § 1003.1(g) (noting that only BIA precedent decisions "shall be binding on all officers and employees of [DHS and immigration judges]"); *Marmolejo-Campos v. Holder*, 558 F.3d 903, 909 n.9 (9th Cir. 2009) (noting "[u]npublished decisions are binding on the parties to the decision but are *not* considered precedent for unrelated cases") (citing BIA Prac. Man., Ch. 1.4(d)(ii) (rev. June 15, 2004)). Second, Appellees' suggestion that the Government acquiesced to the immigration judge's decision by not appealing the decision to the federal courts is without merit. There is no mechanism for the Government to appeal administrative immigration court decisions to the federal courts, and the decision was issued during the pendency of this federal court litigation, where the interpretation of the Agreement is already directly at issue.

between 2006 and 2009. This reflects the Government's understanding that the Agreement did not include accompanied minors. Appellees respond that "[u]ntil the rapid expansion of family detention in the summer of 2014, Plaintiffs' counsel believed that Defendants were at least in substantial compliance with the Settlement with regards accompanied minors." Pls. Br. at 26. This, however, indicates that Appellees believed that the Government's operation of Berks between 2001 and the present, and the operation of Hutto between 2006 and 2009, was in substantial compliance with the Agreement. Appellees cannot have it both ways. They fail to explain why the prior operation of these family residential facilities was in substantial compliance with the Agreement, yet today's operation is not. [23]

For these reasons, the district court erred in concluding that "ICE's conduct subsequent to the formation of the Agreement bolsters Plaintiffs' argument that the preference for release provision requires the release" of accompanied minors and their accompanying parent. Merits Order at 9 (RE009). That statement is simply not supported by post-1996 events. The Government's inability to house most families in residential facilities due to limited appropriations for family detention

[23] Moreover, even Appellees' counsel themselves previously recognized the limited scope of the Agreement in a 2009 report. *See infra* Footnote 1.

space does not constitute an implicit admission that such detention is governed by the Agreement or limited by its terms.

IV. Even if the Agreement Applies to Accompanied Minors, Nothing in the Agreement Creates Enforceable Rights of Release for Accompanying Adult Parents

Even if the Court interprets the Agreement to cover accompanied minors, it cannot read the Agreement to govern DHS's detention and release of those minors' accompanying *parents*. Merits Order at 8-9 (RE008-9).

Appellees suggest that the district court's order does not require release of accompanying parents in almost all cases and instead simply held that "[p]arents must be released in accordance with applicable laws and regulations that apply to all adult detainees." Pls. Br. at 34 n.28. However, the district court insufficiently recognized the statutory mandatory detention regime that accompanies the INA's summary removal processes, *see* Gov't Br. at 13-15,[24] and limited DHS's detention authority over accompanying parents. Pls. Br. at 34 n.28. The district court held that the Agreement requires the release of accompanying parents in all cases "unless the parent is subject to mandatory detention under applicable law or after

[24] *See also* Gov't Br. at 60 and n.30 (noting that the court's "selective reliance on a single statutory reference" to conclude that the parties "would have" contemplated the release of the minor with a detained parent did not comport with the then-existing mandatory detention regulatory framework, which limited the release of all aliens (including families) in expedited removal process to cases involving medical emergencies or a legitimate law enforcement objective).

an individualized custody determination the parent is determined to pose a *significant flight risk*, or a threat to others or the national security, and the flight risk or threat *cannot be mitigated by an appropriate bond or conditions of release.*" Remedies Order at 14 ¶ 4 (RE039) (emphasis added).

This district court-imposed requirement does not – as Appellees contend – apply the governing standard for custody and release determinations that "apply to all adult detainees." Instead, the order substantially restricts the Government's authority to detain adults who are apprehended at the border with a minor. The normal legal standard for an adult alien in discretionary detention to obtain bond is articulated in *Matter of Guerra*, 24 I & N Dec. 37, 40 (BIA 2006). Under *Guerra*, "[t]he burden is on the alien to show . . . that he or she merits release on bond[,]" and, that he or she "does not pose a risk of flight." Moreover, an immigration judge "has broad discretion in deciding the factors that he or she may consider in custody redeterminations." The district court's standard would require release of an adult parent of an accompanied minor unless *the Government* can show that the parent is a significant flight risk or danger. This shifts the burden of proof to the Government to show a *significant* flight risk or danger (a standard that exists nowhere in the INA or in any binding precedents), and imposes a burden on the Government to sustain custody rather than requiring the detainee to show

eligibility for release. This burden- and presumption-shifting is contrary to law and would be very difficult for the Government to satisfy.

The district court acknowledged that "[i]t is true that the Agreement does not contain any provision that explicitly addresses adult rights and treatment in detention." *Id.* That telling recognition shows that the court erred in establishing a presumption of release for adult parents of accompanied minors that the Agreement neither requires by its plain terms nor places within the district court's jurisdiction.[25]

V. The Plain Text of the Agreement Permits the Operation of Family Residential Centers to Ensure the Safety of Accompanied Minors

There was no textual basis for the district court's conclusion that the Agreement precludes the Government from using family residential centers to ensure the safety of minors during their removal proceedings. Merits Order at 7-9 (RE007-9). Paragraph 14 of the Agreement explicitly permits the Government to

[25] Appellees' contention that creating a release requirement for adults gives effect to the release provisions for minors in Paragraph 14 is unsustainable. The language of Paragraph 14 states that the minor would be released "*to* a parent," not "*with* a parent" (emphasis added). The use of the word "to" connotes that the parent taking custody over the minor should not also be in detention at the time of the minor's release. This interpretation is supported by Paragraph 17, which envisions a suitability assessment of the proposed custodian and his/her living environs when possible. Such an assessment cannot be performed in cases where the parent is concurrently detained with the minor.

keep minors in immigration custody "to ensure the minor's safety or that of others." Agreement ¶ 14 (RE052-53). Moreover, the Agreement clearly states that "the INS determines" when detention is required to ensure the minor's safety. *Id.* The district court acknowledged that the Government provided evidence from DHS officials that "separating a child from his or her parent endangers the minor's safety, [and] its policy of detaining an accompanied minor together with his or her parent, rather than releasing the minor to another individual, falls within the exception set forth in Paragraph 14 of the Agreement, which allows for continued detention 'to ensure the minor's safety or that of others.'" Merits Order at 7-8 (RE007-8). These opinions come from the experts expressly authorized by Congress and the Agreement to make these determinations. And in the *Hutto* litigation, plaintiffs (whose counsel are amici here) agreed that "separating the minor Plaintiffs from their parents by releasing the children to adult relatives would be traumatizing and detrimental to them." *Bunikyte*, 2007 WL 1074070 at *3.

As Appellees' brief concedes, the only way that the safety provision in Paragraph 14 might be deemed not to clearly establish the permissibility of family residential centers is if the Court requires "releasing the parent along with the child . . . [which] would, in most instances, obviate Defendants' concern that releasing the child alone would endanger the child's safety . . . ." Pls. Br. at 34-35 n. 28.

But, as discussed in Section IV above, the Agreement contains no such release requirement. The district court improperly adopted a standard effectively requiring the release of accompanying parents in most circumstances, in order to "resolve the issue Defendants identified—of potentially endangering the minor's safety by separating a minor from his or her parent—by releasing rather than detaining the parent and child together if no danger or flight risk is identified." Merits Order at 8 (RE008). However, where the Agreement does not provide any rights for adults, the court erred in imposing such a release requirement for accompanying parents, particularly because it effectively circumvents the Government's permissible safety determination under Paragraph 14.

The practical effect of the district court's decision was the erroneous creation of a judicial avenue for families apprehended at the border who lack any credible or reasonable fear to contest their detention while their removal process remains pending. The Court cannot presume such a serious and far-reaching concession in an Agreement resolving litigation challenging detention of unaccompanied minors.

VI. Alternatively, the Court Should Amend the Agreement

Assuming *arguendo* that the district court correctly interpreted the Agreement, it nonetheless erred by refusing to amend the Agreement to apply only to unaccompanied minors given substantially changed factual and statutory

circumstances. These include the urgent humanitarian situation the Government confronts on the border, *see* Declaration of Woody Lee, Dkt. No. 6-2, and the enactment of the Homeland Security Act and the TVPRA, which have superseded the material provisions of the Agreement and have triggered the Agreement's termination provision. *See e.g.* Carla L. Reyes, "GENDER, LAW, AND DETENTION POLICY: UNEXPECTED EFFECTS ON THE MOST VULNERABLE IMMIGRANTS" 25 Wis. J.L. Gender & Soc'y 301 (Fall 2010) ("The Flores Settlement Agreement serves as the primary foundation for UAC detention policy, and the [TVPRA] recently codified many of its provisions.").

For the past five years, the numbers of unaccompanied children and family units apprehended crossing the border have dramatically increased. *See* Gov't Br. at 9-12. So far in Fiscal Year ("FY") 2016, the southwest border has seen a 171 percent increase in family unit apprehensions over the same period in FY 2015.[26] Each month in FY 2016 has seen the greatest number of apprehensions of family units at the border that have ever been recorded for that particular month.[27]

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[26] *See* United States Border Patrol, Southwest Border Family Unit and UAC Apprehensions (FY 2015 - FY 2016), *available at*: https://www.cbp.gov/sites/default/files/documents/BP%20Southwest%20Border%20Family% 20Units%20and%20UAC%20Apps%20-%20Jan.pdf

[27] *See* United States Border Patrol, Total Monthly Family Unit Apprehensions by Sector (FY 2013 - FY 2016 To Date Through January), *available at*:

The only downward trend in the apprehension numbers over the last five years occurred during the period at the end of FY 2014 and the beginning of FY 2015 after ICE's family residential centers became fully operational (and prior to the district court's order).[28] The citation to statistics showing a drop in apprehensions at the end of FY 2014, *see* Dkt. No. 22-3 at 10, fails to acknowledge the increase that followed.

DHS provided evidence that the inability to use these facilities as authorized by law could lead to an increase in family apprehensions. *See* Homan Decl.; Declaration of Ronald Vitiello, District Court ECF No. 184-2. That is because these facilities allow DHS to use critical enforcement methods, such as expedited removal and reinstatement of removal, which enable the expeditious removal of individuals lacking a legal basis to remain here, and to demonstrate effective border enforcement. Detention and expeditious removal of aliens without genuine

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http://www.cbp.gov/sites/default/files/documents/BP%20Total%20Monthly%20Family%20Units%20by%20Sector%2C%20FY13-FY16TD-Jan.pdf. The assertion that the surge in unaccompanied minor and family apprehensions does not rise to a "crisis" in the context of overall declining border apprehensions, *see* Dkt. No. 22-3 at 8-13, overlooks the special demands of immediately caring and providing safety for this particularly vulnerable population, as well as the additional resources that are required to remove aliens to non-contiguous countries (which represent a greater share of border apprehensions than in prior years).

[28] *See id.*

claims for protection are necessary elements in a comprehensive approach to reducing illegal immigration. *See* Homan Decl. ¶ 12 (RE163-64).

The relevant issue is not whether the Agreement caused the current surge, but whether amendment should be permitted to enable the Government to use all existing statutory tools to respond to surges of unauthorized immigration. The substantial increase in family immigration, which continues today, necessitates preserving the Government's authority to use expedited removal and reinstatement of removal (including detention), to confront this trend as Congress intended.[29]

Although the Remedies Order provides some flexibility during an "influx," this does not sufficiently resolve the problem. The Order unduly limits the Government's statutory authority far beyond the Agreement's intended scope and imposes uncertainty upon the Government's statutory detention and removal authority. The district court found that an influx of unaccompanied minors allows the Government to detain family units at its residential centers for a brief period

[29] Amicus UNHCR's contention that its 2012 detention guidelines should be considered in examining whether to amend this Agreement is incorrect. *See* Dkt. No. 19-2. First, these guidelines are not binding on the Executive. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999). Second, Paragraph 23 of the guidelines supports the Government's current practices, clearly permitting "[d]etention associated with accelerated procedures for manifestly unfounded or clearly abusive cases." *See* http://www.unhcr.org/505b10ee9.pdf (last viewed March 2, 2016). And third, many signatories of the Refugee Convention detain families during their removal processes. *See* Global Detention Project, available at: http://www.globaldetentionproject.org/countries (last viewed March 2, 2016).

necessary to conduct initial screenings. Remedies Order at 10 (RE 35). But this exception only permits a period that the district court deems "as fast as Defendants, in good faith and in the exercise of due diligence, can possibly go in screening family members for reasonable or credible fear." *Id.* The district court indicated that the Government's stated goal of a 20-day average detention time for initial processing, screening, and evaluation of credible fear claims "*may* fall within the parameters of Paragraph 12A of the Agreement," but gave no further guidance. *Id.* (emphasis added). Whatever the current feasibility of achieving such processing time may be, the Government should not be subject to uncertain and indeterminate judicial oversight based on an Agreement that restricts DHS's authority beyond the scope agreed to by the Government (and, indeed, by the parties) and with regard to border enforcement and apprehensions where significant shifts, unexpected developments, and dramatic changes are a virtual certainty.[30]

The order also left other critical questions unanswered, including the detention authority that is necessary to remove an alien who has failed to establish

[30] The district court's vague Order has already engendered further disputes. Appellees' counsel has notified the Government of their intent to bring further enforcement actions because Appellees believe the Government should release families less than a week after apprehension.

a credible or reasonable fear and during any further litigation designed to contest his or her removal. *See* Appellant's Br. at 55-57.[31]

Therefore the Government seeks an order stating that any constraints on expedited removal and reinstatement detention must be limited to those contained in the INA (along with its implementing regulations) and required by the Constitution, not those arising from an erroneous interpretation of the Agreement. Modification would remove any doubt that the Government may house the 10-15% of families who fail to establish credible or reasonable fear in ICE's family residential facilities until their removal can be executed or is no longer reasonably foreseeable. *See Zadvydas. v. Davis*, 533 U.S. 678, 701 (2001). Summary removal processes for families are an essential part of the Government's comprehensive response to surges of unauthorized immigration, and the Agreement should be amended to avoid any suggestion that it restricts the legitimate use of family residential centers.

[31] Appellees do not attempt to answer the critical unanswered questions posed by pages 55-57 of the Government's opening brief. Instead, they argue the Government should have moved for further clarification rather than appealing. Appellees Br. at p.31. But the Government did just that, *see* District Court ECF No. 184, and comprehensively laid out all of the issues that the district court needed to address in any remedial order to enable clear compliance. The district court denied the Government's request for clarification. Remedies Order at 2 (RE027). Any further litigation would have been futile.

The Government does not seek to undo its current obligations regarding *unaccompanied* children. The Government simply seeks to preserve its authority to operate family residential centers as they were operated, without objection between 2001 and 2015. This modification is critical given the ongoing surge of families apprehended at the border.[32]

CONCLUSION

The Government asks this Court to reverse the district court and hold that the Agreement does not apply to accompanied minors, does not regulate the release of adults, and does not restrict the use of family residential centers, as Appellees have accepted since 2001.

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[32] Appellees' undermine their position by criticizing the Government for failing to terminate the Agreement by issuing regulations implementing the Agreement. *See* Stip., Dec. 7, 2001 (RE097). The Agreement has been superseded in all material respects by subsequent statutory enactments, including the TVPRA, which provides a different stand-alone scheme for processing UACs that even Appellees concede "strives to afford *unaccompanied children* protections above and beyond prior law because they entered without parents or legal guardians." Pls. Br. at 50; *see also* 8 U.S.C. § 1232. Consequently, any regulations "implementing the Agreement" would necessarily conflict with the TVPRA. *See* Gov't Br. at 70-72 (providing many examples of differences between the Agreement and the TVPRA). Therefore, this Court should find that the TVPRA essentially serves as a more forceful version of "final regulations implementing this Agreement," and should terminate the binding force of the Agreement.

DATED: March 2, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2016, I electronically filed the foregoing REPLY BRIEF FOR APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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Signature of Attorney or Unrepresented Litigant: /s/ Sarah B. Fabian

("s/" plus typed name is acceptable for electronically-filed documents)

Date:

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